Supreme Court, U.S.
FILED

931235 JAN 7 1994

OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

H.RICHARD AUSTIN and
CORINNE AUSTIN ..PETITIONERS PRO SE

vs.

UNITED PARCEL SERVICE.....RESPONDENT

Petition for WRIT OF CERTIORARI to the VERMONT SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

H. Richard Austin and
Corinne Austin
2126 Brook Hill Ct.
Saint Louis, MO.
63017
(314)-230-2390

44pp

QUESTION FOR CONSIDERATION

Under the standards of the Interstate Commerce Act and Amendments (the "Acts"), can a motor carrier, whose business practises abrogate basic shipper rights (ie illegal delivery - 49 USCS 89; non-issuance of proper shipping receipts - 49 USCS 11707; and violations of an approved Tariff - 49 USCS 11903), employ a defense based on concealing and/or misrepresenting legal agreements with the Interstate Commerce Commission? The purpose of such fraud is to give the false impression the carrier acts lawfully while in fact its activities undermine the very intent and purpose of the Acts. These agreements with the ICC, that are also violated, include some not in the public domain as well as "service" sections of the UPS Tariff (MC-116200). Also in regard to the Tariff, the meaning of the term "publish" in 49 USCS 11903(b) ("Violations of Tariff") is at dispute.

TABLE OF CONTENTS

OPINIONS BELOW.....2

JURISDICTION.....2

STATUTES.....3

STATEMENT OF THE CASE.....5

-- LEGAL ISSUES:

(SHIPPING RECEIPT).....10

(DELIVERY).....16

(TARIFF).....19

REASONS FOR GRANTING WRIT....24

ORDERS OF INFERIOR COURTS....27

FEDERAL STANDARD FOR CERTIORI31

CONCLUSION.....33

APPENDICES.....38

INDEX TO APPENDICES

APPENDIX A..Order of Trial Court (Washington County Superior in case S697-89 Wnc) denying a Motion for a new trial on the basis of Fraud and Newly Discovered Evidence, March 29, 1993.

APPENDIX B.. Order of the Vermont Supreme Court (in appellate case 92-239) affirming order of the trial court denying a new trial, October 22, 1993.

APPENDIX C.. UPS LDI notification (ie Shipper Tracer Response), which after an internal investigation by the carrier found **no "satisfactory proof of delivery of the lost package."**

TABLE OF AUTHORITIES CITED

CASES

"Shipping Receipts":

- Adams Express v. Croninger (226 US 491)...10
- So. Pacific v. Commercial Metals (456 US 336)...10
- Louisville and NP Co. v. Central Iron (265 US 59)...10
- Shaw v. Merchants Bank (101 US 557)...10

"Responsibility of Common Carrier (including Delivery"):

-Bank of Kentucky v. Adams Express (93 US 174).....18
-The Commander in Chief (68 US 43).....18
-N.Y. Central v. Lockwood (84 US 357).....18
-Memphis and CR Co. v. Reeves (77 US 176).....18
-Washington and CR Co. v. Varnell (98 US 479).....18
- No.Penn.Railroad v. Commercial Bank (123 US 727).....19

"Carrier Tariff":
-Harrah v. MMM & RPS (809 F. Suppl 313).....20
-Keogh v. C&NW Ry Co (260 US 156).....20

"Certiorari" (Generally):
-Phillips v. City of Seattle (754 P2d 116).....25
-Pitcairn v. Vowell (580 So 2d 219).....25
-Suburban v. Estate of Pitcher (564 So2d 1118).....25

"Certiorari" (Federal Question):
-Gordon v. Caldcleugh
(7 US 268).....25
-Waters Pierce Oil Co. V. Texas
(212 US 86).....25
-Green Bay v. Mississippi Canal
(172 US 58).....26
-Union Mutual LIfe v. Kirchoff
(169 US 103).....26
-Keokuk v. Illinois
(175 US 626).....26
-Louisville & NR Co. v. Smith
(204 US 551).....26

"Certiorari" (Federal Standards under FRCP 60(b)(3):
-Stridiron v. Stridiron
(698 F 2d 204).....31
-Rozier v. Ford
(578 F2d 871).....31
-Plattner v. Strick
(102 FRD 682).....31
-Square v. Washington Metro.
(657 F2d 68).....31
-U.S. v. 1071.08 Acres
(564 F2d 1350).....31

STATUTES and REGULATIONS

-- 49 USCS 89 - "Delivery; when justified"

-- 49 USCS 10521 - "General Jurisdiction" of ICC.

-- 49 USCS 10762 - "General tariff requirements."

-- 49 USCS 11707 - "Liability of common carriers under receipts and bills of lading."

-- 49 USCS 11903 - "Rate, discrimination, and Tariff violations."

-- 49 CFR 1312.5 -"Posting Requirements"

DOCUMENTARY INFORMATION FROM THE ICC

United Parcel Service Tariff (MC-116200), effective November 25, 1987:

-Sections 430 (Acknowledgement of Delivery), 470 (Packages Returned), 475 (Delivery Attempted Three Times), 515 (Acknowledgement of Claims), 525 (Investigation of Claims), 530 (Disposition of Claims), 535 (Damaged and Lost Property).

-- Parcel Register System:

- Administrative Law Decision, "Petition to Remove Restrictions," February 27, 1979, Pgs 1 and 6.
- ICC Decision, March 20, 1980. pgs 1 and 3.

-- ICC Letter from Mr. John Chaney, Senior Legal Specialist, May 17, 1992

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term, 1993

H. Richard Austin and
Corinne Austin, Petitioners Pro Se

vs.

United Parcel Service, Respondent

Petition for Writ of Certiorari
to the Vermont Supreme Court

PETITION FOR WRIT OF CERTIORARI

Petitioners, H.Richard Austin and Corinne Austin, repectfully request that a Writ of Certiorari be issued so a review can be made of an opinion of the Vermont Supreme Court dated October 22, 1993. **This opinion violated the State court's author-**

ity and jurisdiction by continuing to deprive Petitioners of basic Federal rights under the Interstate Commerce Acts. In addition, this decision violated the legal standards repeatedly enforced by prior decisions of the U.S. Supreme Court.

OPINIONS BELOW

The opinion of the trial court denying a new trial on the basis of fraud and newly discovered evidence (March 29, 1993) and the opinion of the Vermont Supreme Court (October 22, 1993) affirming the order of the trial court appear in Appendix A and B of this Petition.

JURISDICTION

The decision of the Vermont Supreme Court left the Petitioners no further appeal within the State. Therefore, this Petition for a Writ of Certiorari comes before the U.S. Supreme Court, its authority invoked under Title 28 U.S.C.S. 1257(a) "State courts; certiorari".

STATUTES AND REGULATIONS

- 49 USCS 89 ("Delivery; when justified") states in pertinent part:

A carrier is justified...in delivering goods to one who is - (b) The consignee named in a straight bill for the goods...

- 49 USCS 11707 ("Liability of common carriers under receipts and bills of lading") states in pertinent part:

(a)(1) A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission... shall issue a receipt or bill of lading for property it receives for transportation... The liability imposed under this paragraph is for the actual loss or injury to the property caused by (1) the receiving carrier, (2) the delivering carrier... Failure to issue a receipt or bill of lading does not affect the liability of a carrier...
(c)(1) A common carrier...may not limit or be exempt from liability imposed under subsection (a) of this section...

- 49 USCS 10521 (ICC "General Jurisdiction") states in pertinent part:

(a) Subject to this chapter and other law, the Interstate Commerce Commission has jurisdiction over transportation by motor carrier... - (1) between a place in - (A) a State and a place in another State...

- 49 USCS 10762 ("General Tariff Requirements") states in pertinent part:

(a)(1) A motor common carrier shall publish and file with the Commission tariffs containing the rates for transporatin it may provide under this subtitle.

The Commission may prescribe other information that motor common carriers shall include in their tariffs...

(a)(2) Carriers that publish tariffs under paragrapgh (1) of this subsection shall keep them open for public inspection.

(b)(1) The Commission shall prescribe the form and manner of publishing, filing, and keeping tariffs open for public inspection..

49 CFR 1312.5("Posting Requirements") states in pertinent part:

General Posting Requirements. (1) A carrier shall maintain, at its principal office, a complete set of its tariffs (proposed and effective) and those to which it is a party.

(2) Each carrier shall also maintain one or all tariffs at other locations, as may be useful. Carriers shall provide information regarding all locations where tariffs may be viewed...

(3) At all points where tariffs are posted, they shall be made available for inspection...The carrier shall also post, in a conspicuous place in these locations, a notice, in large print, which contains a statement that the tariffs are available for public inspection.

- 49 USCS 11903 ("Rate, discrimination, and tariff violations") states in pertinent part:

(b) A carrier providing transporation or service subject to the jurisdiction of the Commission... that willfully does not file and publish its rates or tariffs as required... or observe those tariffs until changed under law, shall be fined at least $1,000 but not more than $20,000, imprisoned for not more than 2 years, or both.

STATEMENT OF CASE

This legal dispute is centered on a package shipped from Sarasota, Florida to Warren, Vermont in February 1989. The carrier alleges that the package was left somewhere outside the house of the consignee, H. Richard Austin, the alleged delivery performed according to a nationwide UPS policy known as "Driver Release" - ie leaving packages unattended at the delivery site. During litigation, the question arose immediately as to whether the carrier implemented proper, Federal legal standards at this and other stages of the shipping process, the carrier alleging approval of its activities by the Interstate Commerce Commission.

Based on documentary evidence obtained from the ICC after a trial in January 1992, it is apparent the United Parcel Service currently conducts a significant portion of its business activities in violation of the Interstate Commerce Acts,

unilaterally abrogating basic shipper rights, especially where members of the public are concerned.

In the attempt to exonerate itself by falsely alleging approval of its operational methods by the Interstate Commerce Commission, the carrier concealed and/or misrepresented a number of important agreements with the ICC and also raised bogus legal issues intended to place blame on the Petitioners, in effect distracting attention from the carrier's illegality.

Prior to the trial, the Petitioners did extensive research for the case, especially regards the ICC. A large amount of publicly available sources were examined (including 15 years of the ICC's definitive Motor Carrier Cases), and the Commission contacted. Because of staff reductions, the Commission currently has an extensive backlog of complaints exceeding a year and was unable at that time to provide immediate assistance regarding the legal issues of this case.

The trial (January 21 - 28, 1992) was

unfavorable for the Plaintiffs. Subsequently, Petitioner H. Richard Austin contacted the ICC General Counsel, Mr. Robert Burke, and discussed the case with him on the telephone. A senior legal expert, Mr. John Chaney, was designated to examine the matter and provided the Petitioners with documentary evidence that demonstrates UPS engaged in serious misrepresentation regarding the Interstate Commerce Commission in order to prevail in court. This fraud is contained in signed pleadings, evidence presented to the court and sworn testimony by representatives of the carrier. (See some examples in Petitioners' Addition to Motion Regarding Recently Discovered Fraud, August 17, 1993.)

UPS' fraud is focused in three, basic areas of transportation law that have been at dispute in this case from its inception. All are related to the issue of ICC approval: 1- illegal delivery; 2 - non-issuance of a proper shipping receipt; and

3 - non-compliance with key sections of the carrier's Tariff.

These points stated according to the carrier: 1 - "Driver Release" deliveries are allegedly legal under the Interstate Commerce Acts because this method of delivery has been approved by the ICC; 2 - the carrier acted legally in not providing Petitioner Corinne Austin with a shipping receipt because allegedly she is not the legal shipper; and 3. UPS faithfully implements all binding agreements with the ICC, especially regarding delivery and shipping receipts.

LEGAL ISSUES

Under the Interstate Commerce Acts and relevant decisions of the U.S. Supreme Court, the primary protections afforded to shippers and consignees in their dealings with carriers are: 1. a legally correct shipping receipt issued by the carrier which states explicitedly the terms of the shipment and the responsibilities of the parties thereto; 2. verifiable delivery

into the hands of the consignee; and 3. implementation by the carrier of agreements with the Federal regulator, principally the carrier's operational Tariff negotiated by the ICC on behalf of all shippers. **Regarding the lost package involved in this case, the court will note that all three of the fundamental, statutory protections provided in the Interstate Commerce Acts for shippers are absent because of the carrier's illegal business practises. In effect, the instant case demonstrates that in its dealings with shippers, UPS often unilaterally abrogates the very substance of the Acts, substituting its own standards for those legislated by the Congress and upheld by the U.S. Supreme Court.** The record of this case also demonstrates that such a highly improper situation invites fraud in court by the carrier, especially regarding the ICC, and makes efforts to recover for lost packages extremely difficult, both shipper and consignee having been placed in a form

of legal limbo.

1. Shipping Receipt. The fundamental, written document underlying the interstate shipping process is the shipping receipt or bill of lading required to be issued by the carrier (49 USCS 11707);(Adams Express v. Croninger 226 US 491). This document lists the terms and conditions of the transaction and responsibilities of the parties - both shipper, carrier and any connecting carriers (So. Pacific v. Commercial Metals 456 US 336). The dual purpose is served of both receipt and contract (Louisville and NP Co. v. Central Iron 265 US 59). Also, the receipt is not representative of money but is a contract for performance of a certain duty as well as a symbol of ownership (Shaw v. Merchants Bank 101 US 557)

In the instant case, the issue of the non-issuance of a receipt by the carrier was complicated by the fact the shipper, Mrs. Austin, was represented by an intermediary - a Mailboxes Etc. USA franchise outlet that passed the package on to UPS.

Thus, two, collateral issues entered the dispute: 1. Who is the legal shipper where such an intermediary is involved - in this case an entity estalished outside ICC authority? and 2. What document is the legal shipping receipt (the document provided by UPS to Mailboxes (a socalled "pickup slip") or that given by Mailboxes to Mrs. Austin?

Essentially, these collateral issues were raised by UPS, which contends that Mailboxes was the shipper because it dealt directly with the carrier. According to this line of reasoning, only Mailboxes could sue UPS, Mrs. Austin, the consignor, being repeatedly identified as only a "third party" to the basic shipping transaction.

Lately the use of shipping intermediaries, which can be a stationary store or any of a variety of local shipping counters, has become fairly common across the country. This is especially true with UPS which does so much of its business with

the public and receives a signficant volume of packages from these intermediaries.

Assuming that such a prominent corporation as UPS obeys the law, the jury accepted UPS' false allegations that in not issuing Mrs. Austin a receipt, the carrier acted legally. Significant in this regard were repeated statements made in court that this so called "pickup slip" is being employed according to standards approved by the ICC. However, the information obtained by the Petitioners from the ICC clearly demonstrates otherwise ("Petition to Remove Restrictions", February 27, 1979 and ICC Decision March 20, 1980).

The document provided by UPS to Mailboxes is not a valid shipping receipt at all but only a misused or perverted form of paperwork approved by the ICC for very different purposes. UPS not only violated its obligation to issue a proper shipping receipt (49 USCS 11707) but violated the standards approved in this regard by the ICC, employing what amounts to an illegal

act as a fraudulent defense to trick judge and jury and cheat Petitioners out of just compensation.

Although this composite document or "pickup slip" lists many different shipments, the actual shippers are never mentioned, only the consignees, the intermediary being permitted by the carrier improperly to call itself the shipper of all the packages. The information from the ICC identifies this document as a "Parcel Register System" approved by the ICC in 1980. Essentially the Parcel Register is only meant to be used by largescale shippers such as department stores which originate and own all the packages until they arrive at the premises of their customers. However, on its own UPS decided to allow various forms of intermediaries to use the Register. These intermediaries generally have no contact with the consignees listed and are only providing the service of packing and turning the packages over to the carrier designated by the

real shipper. The purpose of the Parcel Register is, of course, to save time so the carrier doesn't have to provide individual receipts for a large number of packages emanating from the same source as defined above. Thus, **a murky and improper situation has emerged regarding documentation provided by this carrier, in which a shipper and consignee, such as the Petitioners, can spend years trying to resolve such a basic issue as the right to sue.** At trial, the judge and jury had considerable difficulty trying to deal with the various issues related to this perverted form of paperwork, ultimately causing Petitioners' case to flounder.

Until the documentary evidence was obtained from the ICC regarding the Parcel Register, it was virtually impossible to resolve effectively this legal conundrum. The ICC decision is unpublished and hence not in the public domain. In addition, not many people at the understaffed ICC even know about it. Thus the carrier was able to raise this skillfully deceptive defense

while confident the Petitioners would probably not be able to uncover the fraud in this key area of the case.

It should also be noted that UPS currently owns a large and growing interest in the nationwide Mailboxes Etc. USA franchise chain. As far as can be determined, UPS' percentage of ownership is at or near effective, corporate control.

In its customer contract Mailboxes excludes any liability for loss or nondelivery. At the same time UPS falsely alleges that Mailboxes is the legal shipper and the only one that can recover from the carrier. Since UPS has considerable control over Mailboxes' business methods, the carrier is in effect employing an entity in which a hands-off relationship does not exist to shield itself from legal recourse.

Example of UPS fraud regarding shipping receipts:

The grounds for this Motion are based on the fact this action is governed by the Interstate Commerce Act. Consequently there is federal preemption of state law. Under the Act, applicable ICC regulations

and UPS' tariffs (emphasis added), the Plaintiffs lack standing to sue UPS...

Mrs. Austin brought the goods to Mail Box Etc. USA. She contracted with them and received her shipping receipt from Mail Box Etc. Mail Box in turn entered into a contract with UPS in which UPS was to deliver the packages. On the shipping receipt for the UPS transaction, Mail Box is clearly designated as the shipper complete with a stamped shipper number. Conversely, the original shipping receipt is between Mrs. Austin and Mail Box Etc. USA. Because Mrs. Austin used Mail Box Etc. USA, she has no standing to sue UPS. Under the Carmack Amendment she may sue Mail Box but she has no cause of action against UPS.

UPS Motion for Summary Judgment, February 12, 1991

Fact: UPS "Parcel Register"

Petition granted to remove restrictions against service between department stores...and, on the other, the premises of the customers of such stores... The UPS documentation is designed to obviate the requirement of individual bills of lading.

ICC Decision, February 27, 1979.

United Parcel Service in 1964 gained Commission approval to use a parcel register system... The system provides a simpliifed method of documentation... but maintains the necessary records in order to comply with statutory and regulatory requirements.

ICC Letter from Mr. John Chaney, Senior Special Assistant (Legal), May 17, 1992.

B. Delivery. According to the Interstate Commerce Acts, verification at the other end of the shipping process - the delivery site - is provided through physical trans-

fer into the hands of the consignee (49 USCS 89). Because of this, it is possible to know definitely whether a package actually arrives at its desitination. However, UPS has once again eliminated for its own convenience an important right and protection for interstate shippers through its "Driver Release Program," the leaving of packages unattended at delivery sites.

The result, of course, is that in the event of loss it is difficult, if not impossible, to determine what really happened to the package. In this regard it should be noted that the name of the consignee, Mr. Austin, appears on a paper delivery sheet for February 28, 1989. However, **UPS conducted an internal investigation into the matter and concluded in its own LDI notification that "no proof of delivery for the above shipment" could be found - in effect concluding that its own driver's record was inaccurate (see Appendix C). Nonetheless, while aware the package in question was lost in transit,**

the carrier has not been willing to compensate the Petitioners and instead has sought through a variety of improper means to place blame on them.

In contrast to the situation involved in this case, the U.S. Supreme Court has consistently upheld a standard requiring the highest level of responsibility by carriers, especially regarding delivery. Duty of a common carrier is to transport and deliver goods safely (Bank of Kentucky v. Adams Express 93 US 174). The carrier is responsible for the "right delivery" of goods (The Commander in Chief 68 US 43). Object of the law regulating common cariers is to secure utmost care and diligence in performance of their duties (N.Y. Central v. Lockwood 84 US 357). A common carrier assumes all risks except those caused by God and public enemy (Memphis and CR Co. v. Reeves 77 US 176). Interstate Commerce Act codifies common law rule making a carrier liable without proof of negligence; Washington and CR Co. v. Varnell 98 US 479). "No

obligation of the carrier... is more strictly enforced" (ie to "deliver to the party designated to receive" the goods. (No.Penn. Railroad v. Commercial Bank of Chicago (123 US 727).

Example of UPS fraud regarding delivery:

Generally all that is required to make a valid, final delivery is transportation of a package to its destination...Additionally, UPS' tariff provides that the driver will obtain a cosignee's (sp) signature only as an extra service for an additional fee thereby implying that the normal service does not require delivery into the hands of the cosignee.
United Parcel Service Post Hearing Memorandum, April 23, 1990

Fact:

If the consignee is not available or does not have money for a C.O.D., or if for any reason delivery cannot be completed on the first attempt, a second and, if necessary, a third attempt at delivery is made automatically, without extra charge. Any package which is refused by the consignee or which for any other reason cannot be delivered, is returned to the shipper automatically and promptly...
ICC "Petition to Remove Restrictions" February 27, 1979, p.6.

C. Tariff. In order to operate in interstate commerce a carrier must file and have approved by the ICC an operation-

al Tariff, which lists the carrier's rates and service procedures. In effect, the Tariff tailormakes the law to the carrier. In a broad sense, it constitutes the "contract between the parties" to a transaction under the Interstate Commerce Acts, the remedies available being limited to those "negotiated by the government with carriers." (Harrah v. MMM and RPS 809 F Suppl 313). Thus, pursuant to its constitutional power to regulate commerce among the States, the Congress has regulated contracts between shipper and carrier, especially through the Tariff.

The Tariff supercedes the receipt or bill of lading, which functions within the context of the Tariff - ie "the rights as defined by the Tariff cannot be varied or enlarged by either contract or tort of the carrier." (Keogh v. C and NW Ry Co. 260 US 156.

Since the UPS practise known as "Driver Release" violates the delivery requirements of the Federal Bills of Lading Act (in this case 49 USCS 89 b.), UPS continu-

ally and falsely alleged approval by the ICC of this illegal business practise in its Tariff.

UPS fraud regarding ICC and its Tariff:

Q. Did I understand you correctly to say that the driver release program was approved by the Interstate Commerce Commission? Are you sure you want to say that?

A. We operate under the Interstate Com merce Commission. Everything we do is approved by them.

Q.... Are you saying that the Interstate Commerce Commission has approved the driver release program?

A. They are aware of the driver release program yes... we have lawyers that deal with the Interstate Commerce Commission, tell them everything we do, and how we do it, and why we do it, and what we are going to do in the future... We would be foolish to change -- to try to start doing some kind of procedure and not inform them... So everything we do is governed by them.

Sworn Testimony of James Anneken, Loss Prevention Manager (ie Claims Manager), UPS Western New England District at trial on January 24, 1992, pages 87 -88.

Fact:

Section 475 of UPS Tariff (MC-116200).

In case the carrier is unable to make delivery of a package, a non-delivery notice will be left at the consignee's address stating that delivery has been attempted. Thereafter a second and, if necessary, a third attempt to deliver the package will be made without additional charge.

Section 470.
Packages refused by consignees or which for any other reason cannot be delivered will be promptly returned to the shipper (emphasis added) without additional charge.

As noted, the Tariff plays a vital role in defining the legal context in which the shipper-carrier relationship functions. As a result, the Congress has placed a duty on the carrier in a criminal statute to "publish its rates or tariffs... or observe those tariffs until changed under law, shall be fined...imprisoned." (49 USCS 11903(b).

In spite of the explicitedness of this statute and the role of the Tariff assigned by the Congress, the facts of this case indicate that UPS currently conducts a large portion of its business in violation of key sections of its approved Tariff. In addition, this case demonstrates that in a court of law the carrier is willing to mispresent and or conceal sections of the Tariff that are being violated.

In defense of statements regarding its Tariff, the carrier continues to allege

that it fully complies with ICC regulations and hence does nothing wrong. In that regard the carrier points to the ICC requirement that a set of its Tariffs be kept open for public inspection at its headquarters in Atlanta, Georgia (49 CFR 1312.5).

However, this argument has limited significance for the instant case because the carrier not only concealed key "service" sections of the Tariff from the court but also deliberately misrepresented such - thereby employing a campaign of fraud in order to relieve itself of the legal consequences of violating its Tariff. Furthermore, **if this argument by the carrier was valid, it would mean the Congress excluded courts of law under the requirement that the carrier freely "publish" or make known its Tariff** (49 USCS 11903(b) and "provide information regarding all locations where tariffs may be viewed". (49 CFR.1312.5(2).

REASONS FOR GRANTING WRIT

In a general sense, certiorari should be granted for this case because the issues and facts indicate that standards embodied in the Interstate Commerce Acts and affirmed by the U.S. Supreme Court are currently under attack in the motor transport business. As a result of its size, UPS has broad influence, especially regards the operational standards of that business. Also, UPS does a large percentage of its volume with the general public, which is ill-equipped to deal with a case such as this, which warrants clarification in an opinion by the U.S. Supreme Court.

Finally, it should not be forgotten that **the status of this case represents a manifest injustice flaunting the basic intent of the Interstate Commerce Acts, the role of the ICC as defined by the Congress and the standards repeatedly upheld by decisions of the Federal judiciary.**

The specific requirements for granting certiorari are present: excess or abuse of jurisdiction or illegal action by an inferior tribunal; no right of appeal and no other adequate remedy (Estate of Weber 229 CA 3d 22). Violation of clearly established principle of law resulting in a miscarriage of justice (Pitcairn v. Vowell 580 So2d 219; Suburban v. Estate of Pitcher 564 So 2d 1118). The record contains explicit material that indicates both jurisdictional excess and errors under the law (Phillips v. City of Seattle 754 P2d 116.)

In addition, **the specific, legal issues at dispute are those of Federal law and the denial of Federal rights by an inferior, state tribunal.** (The definitive Gordon v. Caldcleugh 7 US 268; Waters-Pierce Oil Co. v. Texas 212 US 86; Seaboard AL Railway v. Bodgett 236 US 668.) The U.S. Supreme Court has regularly concerned itself with issues related to interstate commerce and the proper interpretation of relevant statutes - for example, denial of

benefits of Interstate Commerce Act (Atchison T and SF v. Robinson 233 US 173; Atchison T and SF v. Moore 233 US 182).

The Federal questions under the Interstate Commerce Acts have been at dispute in this case from its inception and were properly drawn to the attention of the State courts (Green Bay v. Miss. Canal 172 US 58.) There is no doubt concerning the Federal rights that are claimed or the dispute about them between the parties (Union Mutual LIfe v. Kirchoff 169 US 103) - ie intention of Petitioners to invoke their Federal rights was unmistakeable (Keokuk v. Illinois 175 US 626). Also, there is no doubt the Federal questions were in the minds of the respective parties and at dispute (Louisville and NR Co. v. Smith 204 US 55).

Prior to and during trial Petitioners sought to assert their rights under the Interstate Commerce Acts but were unsuccessful because of UPS' persistent and skillful frauds regarding the ICC. When

the explicit documentary information from the ICC was obtained, it was promptly drawn to the attention of the trial court (Motion for a New Trial Based on Recently Discovered Fraud, July 2, 1992, and Addition to Motin Regarding Recently Discovered Fraud, August 17, 1992). Previously the Petitioners used more than reasonable diligence to ascertain the truth regarding UPS' legal obligations under the Interstate Commerce Acts, which are the focus of this case.

ORDERS OF INFERIOR COURTS

The order of the trial court concluded incorrectly that the documentary evidence obtained from the ICC contained no "new evidence, newly discovered facts or any new evidence of fraud.." This conclusion by the court is totally at variance from explicit statements in the record in which the carrier repeatedly and deliberately misrepresented the nature of its legal obligations under the Interstate Commerce Acts and what the ICC had in fact ap-

proved.

The flawed order the Vermont Supreme Court reaffirms the improper conclusions of the trial court regarding the relevance of the information from the ICC, also preventing the Petitioners from recovering their rights under the Interstate Commerce Acts. The court observes that the jury concluded that Mailboxes was the legal shipper. However, the court ignores the fact that in view of the documentation regarding the Parcel Register System, this is clearly an inaccurate conclusion induced by the carrier's fraud.

The court also places emphasis on the point that allegedly the jury concluded that the consignee received the lost merchandise. This is not correct. The answer for this jury interrogatory (#3) is not circled as required by the court in its instructions regarding a unanimous verdict. Only such verdicts were binding on the court, and only 6 of the original panel reached this conclusion. In this

regard it should be noted that Petitioner Richard Austin attended the trial by himself as a pro se seeking to have the law enforced by the trial court. Instead UPS that was represented by two Vermont law firms and a sizeable group of UPS employees turned the trial into something of a circus. In addition to the various frauds regarding the ICC, UPS' defense emphasized a crude, personal attack against Mr. Austin, which negatively influenced several members of the jury. While the case in the broad sense demonstrates the consequences of a carrier operating outside the legal standards of the Interstate Commerce Acts, this is particularly true of the carrier's abusive conduct at the trial itself.

In addition, it should not be forgotten that UPS' own document (LDI Notification) resulting from the company's internal investigation of the lost package specifically concluded that no "satisfactory proof of delivery" could be found. Thus, any finding that Mr. Austin, the consign-

ee, came into possession of the lost merchandise is not only factually incorrect but virtually impossible.

Finally, the order of the Vermont Supreme Court misinterprets the standard for review under VRCP 60(b)(3), which is also FRCP 60 (b)(3) - "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." The court finds nothing new or evidence of fraud and also concludes that the Petitioners should have obtained the information from the ICC prior to the trial. Therefore, they were supposedly "not prevented from fully and fairly presenting their case at the time of trial" and should not be afforded an opportunity to relitigate the matter. Thus, according to this opinion, a carrier such as UPS is not obligated to speak truthfully about its agreements with the ICC and is even free to misrepresent such to prevail in court, the full burden for this improper situa-

tion falling on an opposing party.

In this regard it should be noted that the decisions of the trial court and the Vermont Supreme Court don't even mention the ICC decision regarding the Parcel Register or the relevant sections of the UPS Tariff entered into evidence. Essentially the Tariff is ignored by both courts as irrelevant to the issues of the case, including the respective rights and obligations of the parties under the Interstate Commerce Acts.

FEDERAL STANDARD FOR CERTIORARI

Under legal precedent regarding FRCP 60(b)(3), certiorari in this case is clearly warranted. To set aside a judgment for fraud and misrepresentation, the conduct complained of must have prevented the losing party from fully and fairly presenting case. (Rozier v. Ford 578 F2d 871; Stridiron v. Stridiron 698 F2d 204; Toledo Scale v. Computing Scale 261 US 399).In particular, this rule is aimed at judgments that were "improperly obtained."

(Rozier; also Plattner v. Strick 102 FRD 682). Clear and convincing evidence is required. (Ervin v. Wilkinson 701 F2d 59). However, the material need not be sufficient to alter trial court's judgment. (Square Construction v. Washington Metropolitan Area Transport 657 F2d 68). **"Rule 60(b)(3) functions to protect the fairness of the proceedings and not the correctness of verdict, a determination as to whether the alleged misrepresented testimony served to alter the result is unnecessary.** Plattner v. Strick 102 FRD at 614. "Intended to assure a fair contest." at 618. And finally **"substantial rights" of parties should be affected** (United States v. 1,071.08 Acres of Land 564 F2d 1350).

And finally in its decision, the Vermont Supreme Court cites Bunch v. US 680 F2d 1271, which in a key respect is a precedent favorable to Petitioners. On page 1283 of this decision, emphasis is given to the concept of error not being harmless if "subtantial rights of the

parties" are affected (quoting the above US v. 1071.08 Acres). The essence of this dispute is about the most basic and substantial rights of shippers in interstate commerce being violated, and the difficulty experienced trying to recover such rights when abrogated by a carrier.

CONCLUSION

The record and facts of this case indicate in the clearest terms that proper legal standards in interstate commerce are being violated by the United Parcel Service. It is equally apparent that during litigation, the carrier elected to employ a campaign of fraud and misrepresentation regarding the ICC in order to conceal its illegality and unwillingness to compensate justly the Petitioners.

The purpose of not taking the time to issue a proper shipping receipt and make a legal delivery (that is, if one occurred) is, of course, to enable the carrier to expand its daily volume and hence profits. Currently the number of packages moved per

day by UPS exceeds 11 million. This huge volume is achieved at the cost of violating correct legal standards under the Interstate Commerce Acts and shippers being deprived unilaterally of their rights. Based on this case, it is now apparent that millions of shippers per day working through various forms of intermediaries are never listed in what little paperwork exists regarding their shipping transactions. As a result, the terms of their shipments are often vague or non-existent. At the other end their package is frequently left lying around at the delivery site, and if lost, it can be impossible to know what really happened to it. The ultimate result of this abusive situation deliberately created by such a prominent corporation is a form of legal nightmare that an average member of the public is ill-equipped to deal with.

Over the last century the Congress and the courts have carefully crafted the body of law within Title 49 that pertains to

motors carriers. The significance accorded this legislation is based on the importance of interstate commerce to the nation's economic well-being. It is no exaggeration that currently a disgraceful situation exists regarding the United Parcel Service which is literally attempting to rewrite the Interstate Commerce Acts for its own convenience. This situation is not only improper from a legal standpoint but also from an economically competitive one as well. Since UPS largely ignores the legislation and legal precedence pertaining to its business, it places the carrier in a very favorable position in relation to competing carriers which attempt to operate lawfully.

As this case currently stands, UPS' campaign of fraud regarding the ICC has successfully vindicated its illegal business practises and violations of the Petitioners' legal rights under the Interstate Commerce Acts. The trial court refused to reopen the case, failing to recognize the significance of the documen-

tary information obtained from the Federal regulator and ignoring the key sections of the UPS Tariff concealed and misrepresented by the carrier. This violation of the trial court's responsibilities under Federal statute and precedent was compounded by the equally improper decision of the Vermont Supreme Court that also ignorned the significance of the UPS Tariff and the unpublished Administrative law decision regarding the Parcel Register. Furthermore, the Vermont Supreme Court chose to place the full burden of this improper situation on the Petitioners because they were not successful at an earlier time uncovering UPS' various frauds. Such an interpretation is at serious variance with both of these courts' responsibilities under Federal statute and legal precedent, especially regarding standards of review. **Under any circumstances, fraud should never be permitted to justify illegality. However, that is just what has occurred in this**

laborious and unnecessary case.

In their Motion for a New Trial and the Addition to that motion and at the hearing before the trial court, Petitioners discussed in detail the new evidence from the ICC and the related fraud by the carrier. In addition, Petitioners' Brief and Reply Brief before the Vermont Supreme Court are equally explicit about this matter. The abuse of jurisdiction by these state courts is indisputable.

At present, this case constitutes a serious injustice and continuing violation of Petitioners' rights under the Interstate Commerce Acts. The Petitioners reinterate their firm belief that this matter more than warrants the attention of the U.S. Supreme Court so other members of the public dealing with this carrier will not have to face a similar ordeal when seeking compensation for their loss.

Saint Louis, Mo. January 3, 1993

H.Richard Austin, Petitioner Pro Se

Appendix A

STATE OF VERMONT
WASHINGTON COUNTY, SS.

CORINNE AUSTIN and H.RICHARD AUSTIN	WASHINGTON SUPERIOR COURT
V.	DOCKET NO. S697-89
UNITED PARCEL SERVICE	

ORDER ON MOTION FOR NEW TRIAL - ALLEGATION OF FRAUD

On February 3, 1993, the Court ordered that the parties submit to the Court any new factual evidence to be offered at the hearing on the Motion for New Trial.

Neither party has new evidence, newly discovered facts or any new evidence of fraud to support or justify a new trial in this cause. No offer of new evidence nor any evidence of fraud was offered prior to the hearing on the Motion nor was any offered at the hearing.

The argument at the hearing was a reiteration of arguments presented long before trial, just before trial and at trial.

The Court adopted the plaintiff's arguments concerning the law at trial.

The law that plaintiff urges was the law that the Court charged.

When the UPS officer testified, plaintiff knew the state of the law and regulations concerning the dispute. That officer's testimony could have been impeached to a greater extent than was done and the final arguments might have been done differently, but there hasn't been sufficient ground shown to warrant granting of a new trial. There was nothing new or not known since trial.

ORDER

The Motion for New Trial based upon

BEST AVAILABLE COPY

(3)

Supreme Court, U.S.
FILED

931235 JAN 7 1994

OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

H.RICHARD AUSTIN and
CORINNE AUSTIN ..PETITIONERS PRO SE

vs.

UNITED PARCEL SERVICE.....RESPONDENT

Petition for WRIT OF CERTIORARI to the VERMONT SUPREME COURT

APPENDIX

TO

PETITION FOR WRIT OF CERTIORARI

H. Richard Austin and
Corinne Austin
2126 Brook Hill Ct.
Saint Louis, MO.
63017
(314)-230-9268

RECEIVED
JAN 31 1994
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Appendix A

STATE OF VERMONT
WASHINGTON COUNTY, SS.

CORINNE AUSTIN and	WASHINGTON SUPERIOR
H.RICHARD AUSTIN	COURT
V.	DOCKET NO. S697-89

UNITED PARCEL SERVICE

ORDER ON MOTION FOR NEW TRIAL -
ALLEGATION OF FRAUD

On February 3, 1993, the Court ordered that the parties submit to the Court any new factual evidence to be offered at the hearing on the Motion for New Trial.

Neither party has new evidence, newly discovered facts or any new evidence of fraud to support or justify a new trial in this cause. No offer of new evidence nor any evidence of fraud was offered prior to the hearing on the Motion nor was any offered at the hearing.

The argument at the hearing was a reit-

eration of arguments presented long before trial, just before trial and at trial.

The Court adopted the plaintiff's arguments concerning the law at trial.

The law that plaintiff urges was the law that the Court charged.

When the UPS officer testified, plaintiff knew the state of the law and regulations concerning the dispute. That officer's testimony could have been impeached to a greater extent than was done and the final arguments might have been done differently, but there hasn't been sufficient ground shown to warrant granting of a new trial. There was nothing new or not known at trial nor is there anything new or not known since trial.

ORDER

The Motion for New Trial based upon fraud of Defendant is DENIED.

Dated at Montpelier, Vermont this 29th day of March, 1993.

DAVID A. JENKINS, SUPERIOR JUDGE

APPENDIX B

ENTRY ORDER

SUPREME COURT DOCKET NO. 92-239

OCTOBER TERM, 1993

Corinne and	APPEALED FROM:
H. Richard Austin	Washington Superior
v.	Court
United Parcel Service	DOCKET -S697-89 Wnc

In the above entitled cause the Clerk will enter:

Plaintiffs sued for damages arising from the alleged loss of a fur coat transported from Florida to Vermont and a jury found in defendant's favor. Plaintiffs now appeal the denial of their motion for relief from judgment. We affirm.

In 1989 plaintiff Corinne Austin brought two fur coats to a company called MailBoxes, Etc. (MBE) in Sarasota, Florida, for shipment to her son in Warren, Vermont, via United Parcel Service (UPS). The

complaint alleged that one of the two fur coats never arrived. During the course of the five-day trial, a number of threshold legal issues arose, including the question of whether plaintiff Corinne Austin was a "shipper" within the meaning of the federal Bill of Lading Act and Interstate Commerce Act.

On January 28, 1992, the jury found that MBE, not Mrs. Austin, was the shipper so that under UPS's theory of the case, her only recourse was against MBE, not UPS. However, the jury also found that the coat in issue was received by the son. On February 28, 1992, plaintiffs filed a motion for a new trial, which was denied on March 26, 1992. On April 21, 1992, plaintiffs filed a notice of appeal, but on July 2, 1992, they filed a motion styled as a "motion for remand," together with a motion entitled "motion for a new trial based on recently discovered fraud." The matter was remanded to the trial court for consideration of the second "new trial" motion, which was denied. This

appeal followed.

Plaintiffs' second "new trial" motion was a motion under V.R.C.P. 60(b)(3), which addresses relief from judgment based on evidence of fraud. In order to prevail under this rule, plaintiffs must prove that the judgment against them was obtained by fraud, misrepresentation or misconduct and that they were thereby prevented from fairly and fully presenting their case. See Bunch v. United States, 608 F2d 1271, 1283 (9th Cir.1982). Though directed by the court to describe allegedly newly discovered evidence of fraud fitting the requirement of Rule 60(b)(3), plaintiffs produced nothing that could be reasonably considered as such evidence. For example, one such piece of "evidence" was a letter from an assistant in the consumer affairs division of the Interstate Commerce Commission in response to a letter written by the plaintiffs on April 6, 1992 -- long after the verdict was entered. The letter does not show defend-

ant's possible fraud, misrepresentation, or misconduct. Furthermore, there is no reason why the letter could not have been obtained prior to trial. See In re M/V Peacock, 809 F.2d 1403, 1405 (9th Cir. 1987) (applying identical federal Rule 60(b)(3) to hold no relief under rule when no causal nexus between mispresentation and party's failure to successfully prepare for trial); see also Darken v. Mooney, 144 Vt. 561, 566, 481 A.2d 407, 410-11 (1984) (applying V.R.C.P. 60(b)(2) and holding that rule "does not operate to afford parties a chance to relitigate matters in which there was ample time to prepare" for trial). Thus plaintiffs were not prevented from fully and fairly presenting their case at the time of trial.

Plaintiffs' other claims of fraud and misrepresentation have no support in the record. The court accepted plaintiffs' view that the law required that the coat be delivered in person to the son, and the jury found such delivery occurred. In view of the ruling and the jury's finding, we

fail to see how plaintiffs' other claims could change the outcome.

Affirmed

BY THE COURT

Ernest W. Gibson III, Associate Justice
John A. Dooley, Associate Justice
Denise R. Johnson, Associate Justice

Vt. Supreme Court
Filed in Clerk's Office
October 22, 1993

APPENDIX C

UNITED PARCEL SERVICE
P.O. BOX 151059
ALTAMONTE SPRINGS FL 32715

SHIPPER TRACER RESPONSE
LDI NOTIFICATION

April 13, 1989

MICHELE
MAILBOXES ETC.
5053 OCEAN BLVD.
SARASOTA, FL 34242
Dear Customer,

This is in response to your urgent request for delivery information on the following shipment to:

H.R.AUSTIN
W.HILLS RD.
WARREN VT 05674

Shipper number...3X8296 Pickup Date-
Number of parcels.....1 2/22/89

Merchandise.....Furs Pickup Record #
942783765

WE HAVE BEEN UNABLE TO PROVIDE SATISFACTORY PROOF OF DELIVERY FOR THE ABOVE SHIPMENT.

To file a claim, please send the information listed below to:

UNITED PARCEL SERVICE, DELIVERY INFORMATION P.O. Box 151059
Altamonte Springs Fl 32715
- Your bill to UPS for the replacement cost. Record on your bill LDI No. 07969382 and your Shipper Number.
- A copy of your original invoice to the receiver.

If you have no invoice, send another document describing the contents to substantiate the amount of the lost...

If you use a Parcel Register, a copy of your shipping document.

Sincerely,
UNITED PARCEL SERVICE

(2)

No. 1235

Supreme Court, U.S.
FILED
FEB 28 1994
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

< OCTOBER TERM, 1993 >

H. RICHARD AUSTIN and CORINNE AUSTIN,

Petitioners,

vs.

UNITED PARCEL SERVICE,

Respondent.

*****
ON PETITION FOR WRIT OF CERTIORARI
TO THE VERMONT SUPREME COURT
*****

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

James Douglas Crawford
SCHNADER, HARRISON, SEGAL
& LEWIS
Suite 3600
1600 Market Street
Philadelphia, PA
19103-4252
(215) 751-2000

Attorney for Respondent
United Parcel Service

20 pp

COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

The sole issue presented by the Petitioners to the Supreme Court of the State of Vermont -- and the only issue decided by that Court -- was whether the state trial court abused its discretion under Vermont Rule of Civil Procedure 60(b)(3) in denying Petitioners' motion for relief from a jury verdict based upon an allegation of fraud.

Petitioners did not challenge, at trial or in the Vermont Supreme Court, the trial court's instructions to the jury on various issues of federal law -- the issues that Petitioners now discuss in their petition for a writ of certiorari.

Thus, the only issue that the Petitioners may present to this Court is the one that they previously presented to the Vermont Supreme Court -- whether the state trial court erred under Vermont Rule of Civil Procedure 60(b)(3) in denying their request

for relief from a jury verdict based upon an allegation of fraud.

TABLE OF CONTENTS

COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iv

COUNTER-STATEMENT OF JURISDICTION 1

COUNTER-STATEMENT OF STATUTES INVOLVED . 1

COUNTER-STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 11

ARGUMENT 12

A. This Court Lacks Jurisdiction To Issue A Writ 12

B. The Trial Court Adopted Petitioners' Proposed Jury Instructions on Issues of Federal Law 13

CONCLUSION 15

TABLE OF AUTHORITIES

CASES

Fox Film Corp. v. Muller,
296 U.S. 207 (1935) 13

Herb v. Pitcairn,
324 U.S. 117 (1945) 13

Klinger v. Missouri,
13 Wall. 257 (1872) 13

Sochor v. Florida,
112 S. Ct. 2114 (1992) 13

STATUTES

28 U.S.C. §1257(a) 1

Supreme Court Rule 29 4

Vermont Rule of Civil Procedure
60(b)(3) . . . . . i, 1, 2, 7, 8, 9,
10 11, 12, 13

COUNTER-STATEMENT OF JURISDICTION

This Court lacks jurisdiction to issue a writ of certiorari because no federal question is presented. See 28 U.S.C. § 1257(a). On the contrary, the sole issue that Petitioners may properly raise is whether the trial court erred in denying their motion under Vermont Rule of Civil Procedure 60(b)(3) for relief from the judgment. Thus, the Vermont Supreme Court's decision has an adequate and independent basis -- indeed, it has its only basis -- in state law.

COUNTER-STATEMENT OF STATUTES INVOLVED

The only statute, rule, or regulation involved in this matter is Vermont Rule of Civil Procedure 60(b), which reads as follows:

RULE 60. RELIEF FROM JUDGMENT OR ORDER

. . .

(b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time,

and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of bills of review are abolished as means of reopening judgments entered under these rules, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

COUNTER-STATEMENT OF THE CASE

On February 21, 1989, Petitioner Corinne Austin brought to a company known as Mail Boxes, Etc. ("MBE") in Sarasota, Florida, two mink coats for shipment to her son,

Petitioner H. Richard Austin, in Warren, Vermont. MBE gave to Mrs. Austin a document acknowledging receipt of the parcels for shipment and stating that MBE was acting as Mrs. Austin's agent for purposes of shipping the goods. MBE's representative packed both mink coats in the same box.

MBE then contracted with Respondent United Parcel Service ("UPS")[1] for transport of the package containing the two mink coats to Vermont. UPS delivered the package to Mr. Austin's residence in Vermont. When the UPS driver discovered that Mr. Austin was not home to personally accept the package, the driver left the package on Mr. Austin's front porch.

On November 24, 1989, Petitioners commenced an action against UPS in the Washington, Vermont Superior Court, alleging

---

1. Pursuant to Rule 29 of the Rules of the Supreme Court of the United States, UPS's parent corporation is United Parcel Service of America, Inc.

that Mr. Austin did not receive one of the two mink coats. UPS defended the action on the grounds, inter alia, that: (1) MBE, not either of the Petitioners, was the "shipper" of the goods, and therefore the Petitioners lacked standing to sue UPS; and (2) Mr. Austin had, in fact, received the allegedly lost coat, as evidenced by the fact that he acknowledged receiving one of the two coats which were both packed in the same box.

After a five-day jury trial, the jury returned a verdict in favor of UPS and against the Petitioners. On the question of standing to sue, Petitioners' theory was that MBE was merely a "freight forwarder," not the "shipper"; Mrs. Austin was the true "shipper" and therefore had standing to sue UPS. At Petitioners' request, the trial court instructed the jury to make a finding as to whether MBE was a "freight forwarder," and Petitioners did not object to the instruction.

The jury found that MBE was not a freight forwarder.

Petitioners also asserted at trial that UPS had breached its duty under the Interstate Commerce Act to properly deliver the package. The trial court rejected UPS's contention that leaving the package on Mr. Austin's front porch constituted "constructive delivery," and the court adopted Petitioners' proposed jury instruction that actual, in-hand delivery to Mr. Austin was required. On these instructions, the jury found that UPS did not fail to properly deliver the package, but that Mr. Austin in fact received the mink coat in dispute. Accordingly, judgment was entered in favor of UPS.

Petitioners filed a motion for a new trial, which the trial court denied, and Petitioners filed a notice of appeal to the Vermont Supreme Court. The Supreme Court then granted Petitioners' motion for remand to the

trial court for consideration of Petitioners' "Motion for New Trial Based on Recently Discovered Fraud." That motion was filed under Vermont Rule of Civil Procedure 60(b)(3), which permits a trial court to grant relief from a judgment based upon "fraud . . . , misrepresentation, or other misconduct of an adverse party."

At the hearing conducted by the trial court on remand, the Petitioners produced a letter from an assistant in the Consumer Affairs Division of the Interstate Commerce Commission ("ICC") in response to a letter written by Petitioners to the ICC on April 6, 1992 -- two months after the verdict was entered. To the extent that it is relevant, the letter states two things: (1) the ICC has previously ruled that entities such as MBE are not, contrary to Petitioners' contentions, freight forwarders; and (2) the ICC has never specifically approved UPS's practice of delivering parcels in some

residential areas without obtaining the addressee's personal signature.[2] The letter does not say that the ICC has ever disapproved that practice (it has not) or that the practice is contrary to UPS's ICC-approved tariff (it is not). This letter from the ICC, which was never authenticated or offered or admitted into evidence -- it is rank hearsay -- is the only "evidence" of "fraud" produced by Petitioners at the hearing.

The trial court denied Petitioners' motion under Rule 60(b)(3) because they had failed to produce "new evidence, newly discovered facts or any new evidence of fraud

---

2. Petitioners also complained in the Vermont Supreme Court about UPS's alleged "misuse" of a "parcel register system." A parcel register system is a simplified form of documentation used by many large-volume shippers. That system is irrelevant to the issues here, however, because MBE did not use a parcel register system to ship the package in dispute. Rather, MBE used the standard UPS shipping receipt.

to support or justify a new trial in this cause. No offer of new evidence nor any evidence of fraud was offered prior to the hearing on the Motion nor was any offered at the hearing." (Order of March 29, 1993)

Petitioners then filed another notice of appeal, this one from the trial court's denial of their Rule 60(b)(3) motion. In framing the issues in their brief on the merits in the Vermont Supreme Court, the Petitioners stated that their "appeal is based solely on the second motion regarding Fraud and Newly Discovered Evidence." (Appellant's Brief, May 13, 1993, at p. 9) They asserted no claims of reversible error in the underlying trial on the merits.

On October 22, 1993, the Vermont Supreme Court affirmed the trial court's denial of the motion for relief from judgment under Rule 60(b)(3). The Court noted that the only "evidence" of fraud was the post-trial

letter from an assistant in the Consumer Affairs Division of the ICC. The Court held that "The letter does not show defendant's possible fraud, misrepresentation, or misconduct. Furthermore, there is no reason why the letter could not have been obtained prior to trial." (Order of October 22, 1993) The Court held that Petitioners therefore failed to meet their very substantial evidentiary burden under Vermont Rule of Civil Procedure 60(b)(3). Indeed, the Court concluded that Petitioners'

> claims of fraud and misrepresentation have no support in the record. The [trial] court accepted plaintiffs' view that the law required that the coat be delivered in person to the son, and the jury found such delivery occurred.

(Order of October 22, 1993)

It is this decision under Vermont Rule of Civil Procedure 60(b)(3) that the Petitioners now ask this Court to review.

SUMMARY OF ARGUMENT

The only issue presented to and decided by the Vermont Supreme Court was whether the trial court abused its discretion under Vermont Rule of Civil Procedure 60(b)(3) in denying relief from the jury verdict based upon an allegation of "fraud." The Vermont Supreme Court's decision thus rests upon a state-law basis that is both independent of the underlying federal issues in the case and adequate to support the court's judgment. This Court therefore lacks jurisdiction to issue the requested writ.

In any event, there is nothing for this Court to review. The trial court gave the jury instructions requested by the Petitioners, and Petitioners have not and

cannot challenge the sufficiency of the evidence on which the jury's decision rests.

ARGUMENT

A. This Court Lacks Jurisdiction To Issue A Writ.

The question whether Petitioners satisfied their burden under Vermont Rule of Civil Procedure 60(b)(3) of coming forward with clear and convincing evidence of "fraud" is a pure question of state law. Moreover, the Vermont Supreme Court denied relief under Rule 60(b)(3) both because the letter from the ICC did not demonstrate UPS's possible fraud, misrepresentation, or misconduct, and because Petitioners had unjustifiably failed to obtain the letter prior to trial. Thus, the state-law basis of the Vermont Supreme Court's decision is both independent of the underlying federal issues in the case and adequate to support the Court's judgment. Accordingly, this Court lacks jurisdiction to review the

Vermont Supreme Court's decision. See, e.g., Sochor v. Florida, 112 S. Ct. 2114, 2119-20 (1992); Herb v. Pitcairn, 324 U.S. 117, 126-27 (1945); Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935); Klinger v. Missouri, 13 Wall. 257, 263 (1872).

B. The Trial Court Adopted Petitioners' Proposed Jury Instructions on Issues of Federal Law.

Even if the Vermont Supreme Court had been called upon to decide an issue of federal law, there still would be no sound basis for this Court to issue a writ of certiorari. There is nothing for this Court to review.

On the standing issue, Petitioners did not object to the jury instruction at trial; nor did they assign the jury instruction as a ground for reversal in the Vermont Supreme Court. Even the letter from the ICC, acquired by the Petitioners after the

trial, contradicted the Petitioners' theory that MBE was a "freight forwarder" and that Mrs. Austin, not MBE, was therefore the "shipper."

On the delivery issue, the trial court instructed the jury as the Petitioners had requested. The jury concluded that UPS had not failed to deliver the mink coat, but that Mr. Austin in fact received it. Petitioners never challenged the sufficiency of the evidence on this issue in the Vermont Supreme Court. Nor could they -- the evidence showed that the two coats were packed in a single box, and Mr. Austin acknowledged receiving one of them. Whether the ICC had specifically approved UPS's delivery procedures is irrelevant in light of the jury's determination that this particular delivery was in fact completed to the named consignee.

CONCLUSION

For the reasons stated above, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

James Douglas Crawford

Attorney for Respondent
United Parcel Service

SCHNADER, HARRISON, SEGAL & LEWIS
Suite 3600
1600 Market Street
Philadelphia, Pennsylvania 19103-4252
(215) 751-2000

Of Counsel.

Dated: February 28, 1994